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WARRANTY OF FITNESS FOR THE PURPOSE IN SALE OF GOODS.

By
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Merchants trade for profit, not for pleasure. In dealers' talks, business practice permits the vaunting of his wares by a seller, and puffery. It is a trite maxim, *simplex commendatio non nocet.* Business methods also regard it as natural for wares to be dressed up so as to be presented in an attractive form. But all that glitters may not be gold, and the loveliest bird may have no song. Hence, in the law of sale of goods, it is a time-honoured principle : *caveat emptor*—Let the purchaser beware. Where parties deal on a footing of equality the rule is unexceptionable. It is not the duty of the seller to point out the defects in the goods he is selling. It is for the purchaser to make sure that he is purchasing the right type of goods. With the growing complexity of commercial transactions with the passage of years, a buyer has in many cases to trust to the judgment or honesty of the vendor, since it would be obviously impossible for the buyer in many cases to go through a long series of interrogatroies to the seller as to the quality or fitness of the articles sold. Relaxation has therefore been made in the application of the principle of *caveat emptor* in certain cases, by imposing a special duty on the seller of goods in regard to the fitness or worth of the goods to serve the purpose for which they are bought. Adverting to the scope of the principle of *caveat emptor* in *Wallis* v. *Russel*[1], Fitz Gibbon, J., observed : " (The maxim) applies to the purchase of specific things (*e.g.*), to a horse or a picture on which the buyer can and usually does exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also where by usage or otherwise, it is a term of the contract, express or implied, that the buyer shall not rely on the skill or judgment of the seller. But it has no application to any case in which the seller has undertaken and the buyer has left it to the seller to supply goods to be used for a purpose known to both parties at the time of the sale ". In the case before the learned Judge, the plaintiff had desired to buy " two nice fresh crabs for tea ". The seller selected two crabs and the buyer took the same. The crabs were, however, infected. It was held that, in the circumstances, the plaintiff should be deemed to have relied on the judgment of the seller, though he had himself had seen the goods.

At common law, where a man sold goods generally, he was deemed to undertake that the article sold was fit for *some* purpose, *Laing* v. *Fidgeon*[2]. If a person sold a commodity for a particular purpose, he was held to have warranted it as reasonably fit and proper for such purpose, *Grant* v. *Cox*[3]. In that case, the plaintiff purchased from the defendants, a certain quantity of copper-sheathing for the ship *Coventry* and paid for it a fair market price. The defendants were copper merchants and not manufacturers. The plates were affixed to the vessel by a shipwright

1. (1902) 2 Ir. Rep. 505.
2. (1815) 6 Taunt. 108.
3. (1825) 4 B. & C. 108 ; 108 E.R. 999.

who did not then discover any defect in them, nor could any defect be discovered by inspection. It was found on the return of the ship from her first voyage after the copper-sheathings were put on that many of the copper plates were corroded by salt water and were full of holes so as to make it necessary to fix new plates. Abbot, C.J., considered the sellers liable and not relieved by reason of the defect being latent. Nor would it make any difference in the law whether the seller was a manufacturer or a mere dealer. Whether or not an article was sold for a particular purpose was a question of fact; but where it was so sold it would carry with it a warranty of fitness for such a purpose. In *Jones* v. *Bright*[1], the plaintiff purchased from the defendant, a manufacturer, copper plates for sheathing a ship. The defendant knew the purpose for which the copper was required, and he had stated 'I will supply you well'. In consequence of some intrinsic defect the cause of which was not proved, the copper lasted only four months instead of four years, the average duration of the article. Best, C.J., held the plaintiff to be entitled to recover damages on the basis of breach of warranty of fitness for the purpose implied in the contract of sale. It may thus be said that where a manufacturer, merchant, or dealer contracts to supply an article which he manufactures or produces or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, merchant, or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be so applied, *Brown* v. *Edgington*[2]. The earlier decisions were fully reviewed in *Jones* v. *Just*[3], and the statement of the law as expressed above was adopted, recognising at the same time that there was no implied warranty that the article sold shall be of any particular quality or sufficient for any particular purpose. In *Randall* v. *Newson*[4], the plaintiff purchased from the defendant, a coach builder, a pole for his carriage. The pole broke in use; the horses became frightened and were injured. The jury was satisfied that the pole was not reasonably fit for the carriage at the time of the sale. The Court held that the article having been sold for the purpose of the carriage there was a warranty by the vendor of its being reasonably fit for the purpose, and that there was no exception as to latent undiscoverable defects. The House of Lords had an opportunity to examine the law in *Drummond* v. *Van Ingen*[5], where cloth-merchants had ordered of cloth manufacturers worstead coatings to be in quality and weight equal to samples previously furnished by the manufacturers to the merchants. The object of the merchants was as the manufacturers knew, though the purpose had not been expressly stated, to sell the coatings to clothiers or tailors. The coatings supplied corresponded with the samples, but due to some defect were unmerchantable for purposes for which goods of that class were used in the trade. The defect existed in the sample as well as the supply. It was latent and not discoverable on usual inspection. Lord Herschell observed: "It is true that the purpose for which the goods were required was not as in *Jones* v. *Bright*[1], stated in express terms, but it was indicated by the very designation of the goods 'coatings'. I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material and the same general character and designation ordinarily would be used." Where, however, an article purchased by designation is capable of being used for a multitude of purposes, Lord Herschell recognised that "it would be unreasonable to require that a manufacturer should be cognisant of all the purposes to which the article he manufactured might be applied, and that he should be acquainted with all the transactions in which it may be used." It follows therefore that, in such a case, warranty of fitness for the purpose will not arise unless the specific purpose of the purchase had been indicated. In *Jones* v. *Padgett*[6], an order was placed by woollen merchants with manufacturers for 'indigo blue cloth'. No particular purpose of the purchase had been disclosed to the seller by

1. (1829) 5 Bing. 533 : 130 E.R. 116.
2. (1841) 2 M. & G. 279.
3. (1868) 3 Q.B. 197.
4. (1877) 2 Q.B.D. 102 (C.A.).
5. (1877) L.R. 12 A.C. 284.
6. (1890) L.R. 24 Q.B.D. 690.

the buyer. The article was capable of being used for various purposes. Lord Coleridge, C.J., remarked : " There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. That was a principle which was established some sixty years ago in *Jones* v. *Bright*[1] and has been acted upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought and there was nothing to fix him with knowledge of that purpose ". While agreeing that the seller should be deemed to know from the designation of the article the purposes to which it may be used, he pointed out that unless the specific purpose was disclosed in such a case a warranty as to fitness for the purpose will not be implied. He said that in the instant case, " there was nothing beyond the position of the parties, to show that the seller knew the specific purpose for which, they were bought and it could not be denied that they might have been used far a variety of other purposes for which they were fitted ".

Even if there was no disclosure of purpose by the buyer to the seller either expressly or by implication, if the seller was aware from previous dealings between the parties of the purpose for which the article was bought, such knowledge will suffice to give rise to the warranty. In *Manchester Liners* v. *Rea, Ltd.*[2], Lord Atkinson observed : " It is by no means necessary at common law that the buyer at the time he contracts or proposes to buy should state the purpose for which he requires the goods. If the seller knows from past transactions with the buyer or otherwise what is the purpose for which the buyer requires the goods, it will equally be implied that the seller warrants them to be reasonably fit for that purpose."

The resulting position at common law may be summed up thus : (i) When a person sells goods generally a warranty of fitness for *some* purpose is implied. (ii) If the goods are bought for a specific purpose, a warranty of their being *reasonably fit* for the purpose is implied. (iii) The warranty will not however extend to *sufficiency* for the particular purpose . (iv) The warranty as to fitness is implied irrespective of the vendor being a manufacturer, producer, or mere dealer in such goods. (v) For the warranty as to fitness to be implied there must be either a disclosure of the purpose by the buyer or knowledge of it by the seller. (vi) The very designation of the article may constitute a pointer to the purpose of the purchase. (vii) There is no exception to the implied warranty to cover latent defects in the article. (viii) Where an article though bought by designation is such as can be put to many purposes, no presumption of knowledge on the part of the seller will arise as to the particular purpose for which the article has been bought, and no warranty of fitness will be implied. (ix) Where there is either disclosure of purpose or knowledge thereof by the seller, a presumption will arise of the buyer's reliance on the judgment and skill of the seller.

Benjamin published in 1868 his Treatise on the Sale of Personal Property. In his view, the Courts had by then completely absorbed the commercial practice relating to the warranty of fitness for the purpose implied by a contract for the sale of goods ; the list of tacit understandings to be read into such a contract was practically closed ; and the time was ripe for the statutory incorporation of the various implications which the Courts had gradully come to accept in relation to such contracts. The Sale of Goods Act was passed in 1893, and section 14 (1) provided for warranty as to fitness of the article sold for the purpose disclosed by the buyer to the seller. Excepting for a doubt cast by Lord Russell of Killowen, C.J., in *Gillespie Brothers & Co.* v. *Cheney Eggar & Co.*[3], judicial opinion has been uniform that section 14 had completely incorporated the previous common law principles on the matter. In *Manchester Liners* v. *Rea, Ltd.*[2], on October 8, 1919, the plaintiffs, ship-owners of Manchester, ordered from the defendants, coal-merchants at Liverpool, 500 tons of South Wales coal for their steamship 'Manchester Importer', at Partington on the Manchester canal. The order was accepted by the defendants. In the autumn of 1919, to the

1. (1829) 5 Bing. 533 : 130 E.R. 116.
2. L.R. (1922) 2 A.C. 74, 84.
3. L.R. (1896) 2 Q.B. 59.

knowledge of the plaintiffs, the coal supply was in the hands of the Coal Controller who restricted the supply for bunkering purposes to South Wales coal carried by sea; and a railway strike prevented the loading of vessels in South Wales, so that the only available supply was coal in stock at Partington (which was wholly inadequate) and on vessels then at sea. At the date of the contract, a collier with South Wales coal had been diverted to Manchester by the Coal Controller, and the coal supplied to the plaintiffs was drawn from that vessel. The coal was unsuitable to the plaintiff's steamer, in consequence whereof she had to return to port. The plaintiffs claimed damages for breach of warranty of fitness alleged to be implied by the contract. It was argued *inter olia* that under section 14 the buyer should expressly or by implication make known the particular purpose to the seller unlike at common law where it would suffice if the seller had knowledge despite absence of disclosure by the buyer, and that the buyer's knowledge that the sources of supply of the vendor were limited and might indeed be confined to the cargo of a particular vessel would negative any implication drawn from the face of the contract that the coal supply must be of a certain quality if it was to be useful for the purpose on hand. In rejectng these contentions, Lord Buckmaster observed: "The section (section 14) embraces and restates the common law doctrine in the form which was clearly derived from the case of *Jones* v. *Just*[1]. If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment." Lord Buckmaster added: "In my opinion, the section completely incorporates the common law and in no way limits its operation".[2]

For section 14 (1) to apply, three requirements should be satisfied: (*a*) the buyer should make known to the seller the particular purpose for which the goods are required, (*b*) the buyer should rely on the seller's skill or judgment, (*c*) the goods should be of a description which it is in the course of the seller's business to supply. Disclosure of purpose may be either express or by implication. It must be express where the goods may be used for a multitude of purposes. In *Preist* v. *Last*[3], the plaintiff, a draper, who was unskilled in the matter of hot-water bottles, went to the shop of the defendant, a chemist who sold such articles, and asked him for a hot-water bottle. He was shown one, and he asked the defendant whether it would stand boiling water. The defendant informed him that it was meant for hot water, but would not stand boiling water. The plaintiff purchased it, and some days later, while in use it burst and scalded the plaintiff's wife. In an action for recovery of damages, it was found on the evidence that the bottle at the time of the sale was not fit for the purpose for which it was intended. Collins, M.R., held that the question whether on a sale of goods the buyer made known to the seller the purpose for which the goods were required so as to show that he relied on the seller's judgment is "one of fact which must depend on all the circumstances of the case", and that in the instant case it was the sale of an article required for the purpose of holding hot water, that that was a 'particular purpose' in the sense of the Act, and that there was an implied warranty that it was fit for the purpose. Collins, M.R., went on to observe: "There are many goods which have in themselves no special or peculiar efficacy for any one particular purpose, but are capable of a general use for a multitude of purposes. In the case of a purchase of goods of that kind, in order to give rise to the implication of a warranty it is necessary to show that, though the article sold was capable of general use for many purposes in the particular case it was sold with reference to a particular purpose". Disclosure of the purpose by implication may arise from the very nature of the goods. The very designation of the goods may point to one particular purpose, and in such a case there is an implied warranty that the goods supplied are reasonably fit for the purpose. If a fishmonger sells crabs or oysters he will be deemed to know that they are required for the particular purpose of being eaten[4]. If a dealer in woollen goods sells underpants he must know that they are required for the particular purpose of being worn

1. (1868) L.R. 3 Q.B. 197.
2. See also *Praist* v. *Last*, L.K. (1903) 2 K.B. 148, 154.
3. L.R. (1903) 2 K.B. 148.
4. *Wallis* v. *Russel*, (1902) 2 Ir. Rep. 505.

next to the skin[1]. An instructive decision on the operation of the principle is found in *Chapronlere* v. *Mason*[2]. In that case, the plaintiff bought a bath-bun at the defendant's shop, and when he bit the bun one of his teeth struck a stone masquerading as a raisin and was broken by it. It was held by the Court that one who buys a bun from a baker makes known to him by implication that he requires it for the particular purpose of eating, that in such a case the buyer relies on the baker's skill or judgment, and, that buns are 'goods' which it is in the course of the baker's business to supply. A most recent decision on the matter is *Mash & Murrell, Ltd.* v. *Joseph I. Emanuel, Ltd.*[3] In that case, the plaintiffs were dealers in potatoes for human consumption in the United Kingdom, and the defendants were also dealers in and importers of potatoes. By a c & f contract dated July 8, 1957, made between the plaintiffs and the defendants' agents, the defendants sold to the plaintiffs 2,000 half-bags of Cyprus spring crop potatoes, then afloat the ship the '*Ionian*' bound for Liverpool at 16 shillings per half-bag, c & f Liverpool. Cyprus spring crop potatoes were normally used for human consumption, and the defendants' agents were fully aware of the nature of the plaintiffs' business through dealings with them over many years, and knew that the plaintiffs required the potatoes for use in their business in England. The potatoes had been loaded on the '*Ionian*' at Limassol, Cyprus, on June 29 and were properly stowed and ventilated for the purpose of the voyage to Liverpool. On the vessel's arrival at Liverpool on July 18, the potatoes were found to be suffering from soft-rot and wholly unfit for human consumption. The Court found on the evidence that even when they were loaded at Limassol the potatoes were not fit to travel to Liverpool. In a suit by the plaintiffs for recovery of damages, Diplock, J., held that the defendants had broken the condition implied in the contract by section 14 (1) of the fitness of the goods for the purpose for which they were needed, in view of the knowledge of the defendants through their agents of the plaintiffs' business through previous dealings coupled with the plaintiffs' request for Cyprus potatoes for use in England raising the inference that the plaintiffs had made known to the defendants the particular purpose for which the goods were required so as to show that they relied on the defendants' skill and judgment. The learned Judge also held that the defendants had broken the condition implied in section 14 (2) as to the merchantability of the goods. In the course of his judgment, Diplock, J., observed that the provisions in section 14 (1) and 14 (2) are really two sides of the same coin, that if the buyer makes known the purpose so as to show his reliance on the seller's skill and judgment then the suitability for the purpose is a warranty and implied condition of the contract; and where he does not make known any particular purpose, then the assumption being that he requires them for the ordinary purpose for which the goods are intended to be used, there is an implied condition that they are fit for those ordinary purposes, that is to say, that they are merchantable; and that, but for that point, there was no other distinction between sub-section (1) and sub-section (2) of section 14. That the two provisions may overlap is also seen from *Godley* v. *Perry*[4]. In that case, the plaintiff, an infant suing by his next friend, claimed damages for personal injuries sustained when a toy catapult which the plaintiff had bought from the defendant broke and injured the plaintiff's left eye while using it to fire a stone. A chemist's report stated that the catapults were made by a cheap kind of ejection moulding material, and that such material was unsuitable for making children's toys being brittle and fractured with a sharp dog-toothed fracture. It was held that the defendant was in breach of the condition in sub-section (1) as the catapult was not reasonably fit for the purpose for which it was required, and of the condition in sub-section (2) as the catapult though sold over the counter was not of merchantable quality. It is however clear that the two sub-sections do not and need not always overlap, and are in essence distinct. For example, in *Wilson* v. *Rickett Cockerell & Co., Ltd.*[5], the defendants, coal merchants, had delivered to the plaintiffs, a husband and wife, a ton of coalite, a manufactured fuel. The wife made up a fire

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1. *Grant* v. *Australian Knitting Mills*, (1936) 70 M.L.J. 513 (P.C.).
2. (1905) 21 T.L.R. 633.
3. (1961) 1 All E.R. 485.
4. (1960) 1 All E.R. 36.
5. L.R. (1954) 1 Q.B. 598.

using some coalite. An explosion occurred caused by a piece of coal containing an explosive which had lurked in the coalite delivered to the plaintiffs. In a suit for recovery of damages to their room and furniture resulting from the explosion under both sub-section (1) and sub-section (2) of section 14 it was held that damages were recoverable for violation of the condition as to merchantability of the article supplied under sub-section (2), but not under sub-section (1) inasmuch as the coalite was sold under a trade name and the condition as to fitness will not be implied in such a case.

The requirement that the buyer should have relied on the seller's skill and judgment was examined in *Cammell Laird & Co.* v. *Manganese, Bronze & Brass Co., Ltd.*[1], which is "indeed the high-water mark of the section 14 (1) cases". In that case, the M.B. & B. Company entered into a contract with the ship-builders, Cammell Laird & Co., undertaking to make two propellers for two specified ships. Each propeller was to be made in accordance with the plans of Cammell Laird & Co. and specifications, and were to be also to the satisfaction of *Z*, for whom the ships were built. On trial, one of the propellers caused so much noise that it was found to be unfit for use. *Z* also expressed dissatisfaction. It was held on those facts that the ship-builders had relied upon the M.B. & B. Co.'s skill and judgment in the matter and could therefore justifiably reject the unfit propeller. In the course of his speech, Lord Wright observed: "Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation". Similarly, in *Medway Oil & Storage Co., Ltd.* v. *Silica Gel Corporation*[2], Lord Sumner had remarked: "The reliance in question, must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity". As Diplock, J., has pointed out in *Mash & Murrell's case*[3], the observations must be read *secundam subjectam materiam*, and not as in any way deviating from earlier expositions. In *Manchester Liners* v. *Rea, Ltd.*,[4] the House of Lords had held that the requirement as to reliance on the seller's skill and judgment would be satisfied if the specific purpose of the purchase of the goods is disclosed by the buyer to the seller when placing the order. In the case of a buyer who acts through an agent or servant, as a corporation must do, if the agent who conducts the negotiation is the same person as the agent who makes the contract on behalf of the buyer there is no difficulty; and the making known to the seller of the buyer's specific purpose may take place during the negotiations preceding the making of the contract of sale, and there need not be any reference to it in the contract of sale itself. But whether an inference as to the buyer's reliance on the seller's skill and judgment can be drawn where the disclosure of purpose is made by one agent of the buyer and the contract itself is made by another agent of the buyer who had not been fully posted with all the details of what had taken place between the first agent and the seller but had been only informed in a general way came up for consideration, recently before the Privy Council in *Ashford Shire Council* v. *Dependable Motors*[5]. In that case, the appellants a corporation, desired to acquire a tractor for use in road construction work. It asked one Mr. Bowman, who had been selected for appointment as shire-engineer but had not yet taken up his appointment and joined duty, to inspect a tractor which the respondents had for sale. While inspecting the tractor Mr. Bowman told Mr. Corney, the respondents' managing director, that he had come on behalf of the appellants, and asked him whether the tractor would do "the work we expect to do". Mr. Bowman also told Mr. Corney that the machine was for use entirely on road construction work which entailed some clearing, a lot of dozer work, and a lot of scoop work in which it would be required to haul a scoop that the appellants had already bought. Mr. Corney replied that that was the type of work for which the tractor was built and was the type of work that would suit it. Mr. Bowman reported to the shire-clerk, Mr. Heywood that he had inspected the tractor and that it seemed to him to have plenty

1. L.R. (1934) A.C. 402, 423.
2. (1928) 33 Com. Cas. 195, 196.
3. (1961) 1 All E.R. 485.
4. L.R. (1922) A.C. 74.
5. (1961) 1 All E.R. 96.

of horse-power and was big enough for the work required. Mr. Heywood passed on the information to Mr. Black, the President of the Council. The shire-council thereupon bought the tractor acting through its President and clerk. The tractor was not, in fact, reasonably fit for purposes of road construction work. The appellants claimed damages for breach of the condition under section 19 (1) of the New South Wales Sale of Goods Act, 1923-53, which is in almost identical terms as section 14 (1) of the English Sale of Goods Act, 1893. In delivering the judgment of the Privy Council holding the respondents liable, Lord Reid pointed out : "In the present case, Mr. Bowman conducted the negotiations on behalf of the appellants and Mr. Heywood made the contract on their behalf. The question is whether it is necessary that the former should have made the latter aware *fully* of what took place during the negotiations before the latter agent made the contract. The appellants being a corporation cannot themselves rely on or be induced to act by anything ; they can only rely on or be induced to act through their agents or servants. Mr. Bowman was their agent when obtaining Mr. Corney's assurances. Equally Mr. Black, the President of the Council and Mr. Heywood were only their agent and servant when deciding to order and ordering the tractor. Mr. Black and Mr. Heywood were induced to do this by Mr. Bowman's report, and that report was induced by the seller's assurances received by Mr. Bowman on behalf of the appellants. Mr. Black was not the appellant corporation, and their Lordships cannot hold that their answer to the question whether the appellants are to be held to have relied on the seller's skill or judgment should be affected by the fact that Mr. Black was not told what had taken place between Mr. Bowman and the seller ".

Where the buyer himself selects the article, obviously there can be no implied condition as to fitness, *Brown* v. *Edgington*[1]. In Benjamin on Sale, it is stated[2] : "Where it is part of the contract that goods shall be made according to a certain plan or according to a certain style, shape, or form, or of specified materials, the buyer relies upon his own judgment as to the sufficiency of the plan, style, etc., or of the materials for effecting the purpose contemplated ; the only liability then of the manufacturer is to execute the work according to the plan etc., and in a workmanlike manner, and to exercise due care and skill in the selection and testing of the materials, in the absence of an express engagement on his part to produce goods which will be adapted to the buyer's purpose ". The statement has been judicially approved in *Cammell Laird's case*[3]. Reliance on the skill and judgment of the seller need not be an exclusive reliance, *Medway Oil and Storage Co.* v. *Silica Gel Corporation*[4]. The presumption as to reliance on the seller's skill and judgment arising out of the disclosure of the specific purpose by the buyer is not negatived merely because the defect is such as could not be found out by any amount of skill or judgment. In *Frost* v. *Aylesbury Dairy Co. Ltd.*[5], the defendants who were dealers in milk supplied the plaintiff with milk for consumption by him and his family. A pass book in which the daily supply was entered was inter-leaved with a printed notice of the precautions taken by the defendants to supply milk pure and unadulterated and free from the germs of disease. The milk supplied to the plaintiff actually contained typhoid germs. The plaintiff's wife was infected through using the milk and died of typhoid. The evidence showed that the existence of the germs could only be discovered by prolonged investigation. In an action for recovery of damages, Collins, M. R., observed : "The point mainly pressed upon us on behalf of the defendants was that the buyer could not be said to rely on the skill or judgment of the sellers in a case in which no amount of skill or judgment would enable them to find out the defect in the milk supplied. That amounts to a contention that a seller of goods cannot be answerable for a latent defect in them unless upon a special contract to that effect......The matter was specifically dealt with in the considered judgment of the Court of Appeal in *Randall* v. *Newson*[6], where

1. (1841) 2 M. & G. 279.
2. 7th Edition, pp. 662, 663.
3. L.R. (1933) 2 K.B. 141.
4. (1928) 33 Com. Cas. 195.
5. L.R. (1905) 1 K.B. 608 (C.A.).
6. L.R. (1877) 2 Q.B.D. 102 (C.A.)

it was held that on the sale of an article for a specific purpose there is a warranty by the vendor that it is reasonably fit for the purpose and that there is no exception as to latent undiscoverable defects".

The Indian law on the subject was formerly contained in section 114 of the Indian Contract Act and is now stated in section 16 (1) of the Indian Sale of Goods Act. In spite of small differences in wording between section 114 of the Contract Act and section 14(1) of the English Sale of Goods Act, it was held in In re *Andrew Yule & Co.*[1], that the Indian law was the same as the English law. In that case, goods described in the contract as of 'Standard Mills Make' were sold F.A.S. Calcutta. They were resold by the buyers to sub-buyers in America and were shipped without examination at Calcutta. After arrival is America, the sub-buyers rejected a portion of the goods on the ground of their peculiar odour rendering them unfit for packing food-stuffs, one of the principal purposes for which such goods are used. In the context of those facts, Ameer Ali, J., observed. "In my opinion, although the Indian section of the Contract Act differs slightly in wording from the English section, the law is the same and the rules may be formulated as follows : (i) If the buyers expressly communicate to the sellers the purpose for which the goods are wanted (and the other conditions are present) then there is an implied condition of fitness. (ii) Apart from express communication, that knowledge may be imputed to the sellers by reason of the circumstances of the case. (iii) Where the goods may be utilised for a variety of purposes known to the supplier, then unless he is notified of the particular purpose for which these goods are wanted there is no condition of fitness that they shall be fit for the particular purpose."

If in spite of the small differences in language section 114, Contract Act, had embodied the same law as section 14(1) of the English Sale of Goods Act, 1893, it will be *a fortiori* in regard to section 16(1) of the Indian Sale of Goods Act, which runs in almost identical terms as section 14 (1) of the English Act. Since this last provision is held to have completely incorporated the English common law principles on the matter, it will follow that the Indian law on the matter is the same as the common law stated, perhaps, in more modern language.

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1. (1931) I.L.R. 59 Cal. 928.

ALIENATION BY A LIMITED OWNER AND THE REVERSIONER'S RIGHT TO CHALLENGE

By

B. SIVARAMAYYA, *Lecturer, Faculty of Law, University of Delhi.*

Banso v. *Charan Singh*[1], provides a straight and categorical answer to an important and interesting question under the Hindu Succession Act. The facts lie in a narrow compass. One Banta Singh, a Sikh, governed by the customary law of the Punjab died leaving his widow As Kaur and three daughters. As Kaur, in 1954, under a registered deed made a gift of the entire property, ancestral and non-ancestral, left by her husband, to her daughters. The reversioners who were fifth degree collaterals brought a suit for a declaration that the gift was void and inoperative against them. On the death of the widow, according to the law prevailing before the Hindu Succession Act, the collaterals would be the preferential heirs to ancestral properties whereas to the non-ancestral properties the daughters would be the preferential heirs. If succession to the properties is to be determined under the Act, the daughters will have a prior claim over the collaterals to the ancestral and non-ancestral properties. Tek Chand and P.C. Pandit, JJ., negatived the claim of the reversioners to such a declaration.

In so holding Tek Chand, J., drew support from the decision of the Privy Council in *Duni Chand* v. *Mst. Anarkali*[2]. In Duni Chand's case on the death of a Hindu in 1921, his mother inherited the estate as a limited owner. Subsequently the Hindu Law of Inheritance (Amendment) Act, 1929, was passed which introduced in the order of succession four new heirs, *viz.*, son's daughter, daughter's daughter, sister and sister's son, next to father's father and before father's brother. The question arose whether the Act applied only to the case of a Hindu male dying intestate on or after February 21, 1929, when the Act came into force, or whether it also applied in the case of a Hindu male dying intestate before the Act came into operation and succeeded by a female heir who died after that date.

Their Lordships of the Privy Council reiterated the well-established proposition that the succession does not open to the heirs of the husband until the termination of the widow's estate and that upon its termination, *the property descends to those would have been heirs of the husband if he had lived upto and died at the moment of her death*[3]. In accepting this view they observed : " In the argument before their Lordships reliance was placed on the words 'dying intestate' in the Act as connoting the future tense . . . . . . The expression merely means 'in the case of intestacy of a Hindu male'. To place this interpretation on the Act is not to give retrospective effect to its provisions, the material point of time being the date when the succession opens, namely, the death of the widow". The observations are in *pari materia* as the words " dying intestate " occur in section 8 of the Hindu Succession Act, 1956.

On the position of reversioners and the maintainability of suits instituted by them after the passing of the Hindu Succession Act, two views have been expressed. The Allahabad High Court (the Patna and Madhya Pradesh High Courts having abandoned their earlier stand) in *Hanum Prasad* v. *Indrawati*[4], holds that reversion stands abrogated by virtue of the provisions of the Act and that as there will be no reversioners after the passing of the Act, nobody can get a decree *qua* reversioner now. As to the competency of the heirs of a widow to impugn alienations affected before the passing of the Act, it says that as they derive their rights through her, they are estopped as much as she was. Pausing here for a moment, it may be noted that to apply the doctrine of estoppel to such cases is to provide an inadequate solution unsound in principle. The net result would be to confer the benefit of enlarged rights to the alienees from the widow, who with their eyes open purchased the properties in which she could convey only a limited interest. In view of the clear pronouncement of the Supreme Court in *Kotturuswami* v. *Veeravva*[5], that the object of the Act was to improve the legal status of women and that it was not intended to benefit the alienees, at least the latter of these propositions cannot be sustained. Moreover, the view of the

1. A.I.R. 1961 Punjab 45.
2. (1946) 2 M.L.J. 290 : L.R. 73 I.A. 187 : A.I.R. 1946 P.C. 173.
3. Italics mine.
4. A.I.R. 1958 All. 304.
5. (1959) 1 M.L.J. (S.C.) 158 : (1959) 1 An. W.R. (S.C.) 158 : (1959) S.C.J. 437 : A.I.R. 1959 S.C. 577.

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Allahabad High Court is opposed to preponderance of authority and the view of text writers.[5-a]

On the other hand, the majority of High Courts hold that the reversioners as a class are not entirely extinct, and that where an alienation without necessity has been made before the Act, and as a result of which the widow is not in possession, section 14 cannot operate so as to convert the limited ownership to full ownership; and the reversioners are not debarred from continuing and maintaining suits. This view is shared by the Andhra[6], Bombay[7], Calcutta[8], Kerala[9], Madras[10], Orissa[11] and the Punjab[12], High Courts ; and later by the Madhya Pradesh[13] and Patna[14] High Courts over-ruling their former decisions.

But it is only a few High Courts that throw any indication as to how the reversioners are to be ascertained, whether under the old law or under the new enactment. The question did not arise in the Bombay case as it dealt with forfeiture of rights of a widow on her remarriage. In this context it is worthwhile to recapitulate that the suit is brought in a representative capacity and on behalf of all the reversioners. "The act complained of is to their detriment just as the relief sought is to their common benefit." Thus the determination of the issue was not called for in these decisions and the observations, if any, are merely *obiter*.

In *Sansir Patelin* v. *Satyabati Naikani*[15], the Orissa High Court goes on to say that "the old law prevailing amongst the Hindus regarding the rights of a reversioner must remain intact and must be followed by Courts of Justice."

These decisions reveal that, barring observations of an *ex cathedra* nature, the Courts have left open this important question.

Again Dr. Derret in a learned article takes the view, although hesitantly, that the reversioners will have to be ascertained according to the principles of the old law. *Appropos* of the same it has been observed[16] : "It is submitted that on the death of such a female owner, the persons who would have been the reversioners had the Act not been passed succeed in their old order to the property and are entitled to recover from the alienee or his successor whatever was improperly alienated to him. Therefore even during the female owner's lifetime it is open to presumptive reversioners to sue, for a declaration that it will not be binding upon them when succession opens (which cannot now be before the death since forfeiture or surrender of the limited interest seems to be impossible but the matter is not free from obscurity). The alternative view, that the reversioners are to be sought from amongst the last male owner's heirs according to the Schedule, etc., is probably incorrect ; for they are rights existing prior to the Act, and untouched by the Act, that are being considered."

However, Tek Chand and P.C. Pandit, JJ., preferred the "alternative" view. The decision also gives rise to an interesting question whether its *ratio decidendi* should be limited to cases where the alienees happen to be the nearest heirs, or whether it enunciates a rule of wider ambit. It is respectfully submitted that the view of the Punjab High Court is sound. As the Act provides for the rules of succession, the old rules must be deemed to have been abrogated as per the language of section 4 of the Act, and reversioners will have to be ascertained according to the provisions of the new Act. Considerations of equity also favour such a course as the scheme of new succession is based on nearness of blood and natural bonds of affection. After all, these new legislations have been introduced in a reformative spirit to rectify the iniquities and to remove the anomalies in the Hindu Law, and therefore maximum scope should be given to their operation.

5-a. *Principles of Hindu Law* by Mulla, p. 978 (Ed. XII).
6. *Somiah* v. *Rattamma*, (1958) 2 An.W.R. 662 : A.I.R. 1959 Andh. Pra. 244.
7. *Ramchandra* v. *Sakharam*, A.I.R. 1958 Bom. 244.
8. *Gostha Behari* v. *Haridas*, A.I.R. 1951 Cal. 557.
9. *Chandrasekhara* v. *Sivaramakrishna*, A.I.R. 1958 Kerala 142.
10. *Marudakkal* v. *Arumugha*, I.L.R. (1958) Mad. 354 : (1958) 1 M.L.J. 101: A.I.R. 1958 Mad. 255.
11. *Sansir Patelin* v. *Satyabati Naikani*, A.I.R. 1958 Orissa 75.
12. *Amar Singh* v. *Sewaram*, A.I.R. 1960 Punjab 530 (F.B.).
13. *Mt. Lukai* v. *Niranjan*, A.I.R. 1958 M.P. 160 (F.B.).
14. *Harak Singh* v. *Kailash*, A.I.R. 1958 Patna 58 (F.B.).
15. A.I.R. 1958 Orissa 75.
16. *Anomalous decisions from Punjab on the Hindu Succession Act*, 1956, by J. Duncan M' Derret, 1958 S.C.J. (Journal) p. 259 at 266.

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C. THE RULE OF LAW AND DHARMA

By

S. VARADARAJULU NAIDU, B.A., B.L., *District and Sessions Judge (Retired).*

'The seat of law is in the bosom of God'. Such a terse expression need not raise even a ripple of doubt in the land of *The Bhagavatgita*, because, in another context, the Lord Krishna asked Arjuna to behold in His Viswarupa, the whole Universe! The concept of law, in that expression, connotes pure righteousness or Dharma, the gem of a word in the Hindu Jurisprudence.

God, in man's sublimest conception, is synonymous with Righteousness. There is no ancient book of India, scriptural or non-scriptural, worth the name, that has not enthroned Dharmaic life or Dharma on the highest pedestal possible. Indeed, the Taittiriya Samhita has gone to the extent or remarking that Dharma sustains the Universe, thereby high-lighting the importance of Dharma, as though without if the edifice of the Universe will crackle. More recently, the pragmatic Kautilya has stated at the very threshold of his Artha-Sastra. "Therefore the King should not allow his subjects to swerve from or fail in their Dharma, for whoever holds fast by Dharma will be happy in this world and the next".

In the pageant of world's history, compared to the super-complex modern world, especially of this sputnik age, the world of the Taittiriya Samhita, and even that of Kautilya were simple and primeval. In one sense, law mirrors a people's general development, and is therefore ever-growing, qualitatively and quantitatively. One may, however, discern a rare maturity in the legal thought of ancient India. Law was then certainly conceived to be dynamic, as it was intended to conduce to the needs of (*Lokasangraha*) social welfare. Law was also intended to promote Dharma or righteousness, conducive, in its turn, to Moksha. Not troubling ourselves about Moksha and confining our thoughts only to our mundane world, it has to be noted that the ancient Hindu Juris-theologians thought that righteousness or Dharma should be the basis of the validity of all laws for all time to come. It would indeed be a tragedy to humanity to complacently conceive that in a secular state, laws may be divorced from ethical standards, at least in degrees thereof. Nor would it be less tragical, if that is the norm adopted in a welfare state either of the dictatorial or of the democratic variety. The tribe of Rishis, who designed the chanting of "*Sarvē-Janaksukhino Bavanthu*" as an invocation, were never oblivious that in man's evolution to the highest worldly prosperity, Dharma or righteousness is the breath or the Prana of all laws.

Yet law, to achieve its purpose of social well-being, must have among others the element of flexibility, perfectly capable of being adjusted to economic or other kinds of social development of any human society, especially in this fast changing-world. As Nehru said "law must run closely to the Rule of Life." In other words, however complex or technical a given law may be to suit a particular set of circumstances of a business or of an industry in the public or the private sector or of any kind of institution, state or non-state, the thread of the

Rule of Law must be woven into its fabric. For example, the Cultivating Tenants Protection Act, the Industrial Disputes Act or any other Industrial or Factory Law must be fundamentally based on the Rule of Law or righteousness, as between the various personnel in society for whose benefit they have been promulgated, whatever may be the conflict in their interests *inter se.*

It is a good augury for mankind that the International Congress of Jurists from 53 countries, who assembled at New Delhi in January, 1959, emphasised the all-importance of the Rule of Law in relation to the Legislative, the Executive, the Criminal Processes, the Judiciary and the Legal Profession. The Congress divided itself into four Committees, each to deal with one of these four subjects. In every one of the conclusions of those Committees, as well as in what is called "The Declaration of Delhi of 1959" the spirit of the Rule of Law pervades. Dr. Lalive, the Secretary-General of the International Commission of jurists, having its head-quarters at Geneva, echoed in *modern mantle*, at that Congress, the sentiment of the Taittiriya Samhita, when he said that the objective of the Rule of Law, is "a World in peace under Law."

While the frontiers of the significance of Dharma, as a juris-ethical concept, are wider than the latter-day juristic concept of the Rule of Law, as the former is stated to transcend the limits of human life and to bring about Moksha thereafter, it is a marvel that, juristically considered, both have several elements of similarity.

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OUR CHIEF JUSTICE.

We have very great pleasure in recording the appointment of His Lordship Sri S. Ramachandra Iyer as the permanent Chief Justice of the High Court of Madras. The unusual interval of time between the retirement of the previous Chief Justice Sri P. V. Rajamannar and the appointment of his permanent successor gave rise to unnecessary speculation as to the reasons for the delay. When His Lordship was made a Judge of the High Court five years ago, it was considered almost certain that His Lordship's appointment as the Chief Justice would be a matter of course.

During the short period of his term as Officiating Chief Justice, His Lordship has impressed upon every one his great aptitude for the duties of Chief Justiceship. His Lordship has earned the esteem of the Bar and secured in abundance the good-will of lawyers and the Staff of the High Court alike. We have no doubt that under his able stewardship the administration of the High Court will further improve in efficiency and effectiveness. We are sure that when His Lordship lays down office he will have added one more name to the roll of India's distinguished Chief Justices.

His Lordship was sworn in by His Excellency the Governor of Madras at Raj Bhavan on the 16th September, 1961. The Advocate-General Sri V. K. Thiruvenkatachari, the President of the Advocates' Association Sri T. M. Krishnaswami Iyer, and the President of the Bar Association Sri S. Chellaswami offered felicitations to His Lordship on his appointment. His Lordship the Chief Justice made a suitable reply.

NEW JUDGES OF THE MADRAS HIGH COURT.

We welcome the appointment of two new Judges to the Madras High Court. The Judges Designate Sri R. Sadasivam and Sri K. S. Venkataraman are not new to the members of the Bar and to the citizens of Madras. Sri R. Sadasivam has served as Chief Presidency Magistrate and Additional Sessions Judge in Madras; while Sri K. S. Venkataraman has served as the Chairman of the Sales Tax Appellate Tribunal, Madras.

SRI R. SADASIVAM.

Sri R. Sadasivam was born in the year 1910, and after a brilliant academic career studied Law. He obtained a First Class in the B. L. degree examination and qualified himself for the M. L. degree in Criminal Law. He had his apprenticeship under the late Sri V. L. Ethiraj, a leader of the Criminal Bar in Madras. He entered Judicial service in the year 1942 when he was selected as a District Munsiff. A good part of his Judicial service has been spent in the City where he has served in the various capacities of Additional Judge of City Civil Court, Chief Presidency Magistrate and Additional Sessions Judge. His elevation to the Bench of the Madras High Court is a fitting tribute

to his brilliant career and excellent record of service. We have no doubt that the traditions inherited from his father who was a District Judge himself, and his wide learning will be reflected in his judicial pronouncements.

SRI K. S. VENKATARAMAN.

Sri K. S. Venkataraman was born in the year 1913, and had his education in Madras. Graduating from the Presidency College in Mathematics (Honours), he came out successful in the I.C.S. competitive examination and entered the Indian Civil Service in 1935. After a few years of service as Sub-Collector he opted for the Judiciary. He had his early Judicial training under Sri P. Rajagopalan, who recently retired as Judge of the Madras High Court. As District Judge for a number of years he has served in the several Districts of the State. He was appointed a Member of the State Transport Appellate Tribunal, and later became the Chairman of the Sales Tax Appellate Tribunal from where he has been elevated to the Bench.

With his rich and varied experience in the Judiciary and in Special Tribunals, we have no doubt that Sri K. S. Venkataraman will prove a tower of strength to the Madras High Court.

Their Lordships Sri R. Sadasivam and Sri K. S. Venkataraman were sworn in on 21st September, 1961, in the Chief Justice's Chambers. His Lordship Justice Sri R. Sadasivam took his seat with the Chief Justice in the First Bench, and His Lordship Justice Sri K. S. Venkataraman took his seat in the Second Bench with His Lordship Justice Sri S. Ganapatia Pillai.

Their Lordships were welcomed on behalf of the Bar by Sri K. S. Desikan and Sri R. Gopalaswami Iyengar respectively, and were assured the co-operation of the Bar in the discharge of their duties.

THE SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS ACT (CIV OF 1956).

By

G. V. KRISHNAN, B.L., M.L., *Lecturer in Law and Advocate, Agra.*

The preamble to our Constitution says *inter alia* :

" We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens :

Justice, Social, Economic and Political ; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity, and to promote among them all Fraternity assuring the dignity of the individual and the unity of the nation, etc."

To implement these objects Part III of our Constitution has enunciated certain Fundamental Rights. Article 19 (1) guarantees to citizens the right among others, to practise any profession, or to carry on any occupation, trade or business. (Sub-clause (*g*)). This right is however, subject to control by clause (6) of Article 19.

The Suppression of Immoral Traffic in Women and Girls Act was passed by Parliament in the Seventh Year of the Republic of India, in pursuance of the International Convention signed at New York on 9th May, 1950. The Act consists of 25 sections in all. Section 3 of the Act provides for punishment for keeping a brothel or allowing premises to be used as a brothel. According to section 4 of the Act any person over the age of 18 years who knowingly lives, wholly or in part, on the earnings of the prostitution of a woman or girl shall be liable to punishment. Section 5 prohibits the procuring, inducing or taking a woman or girl for the purpose of prostitution. Section 6 punishes a person if he or she detains a woman or girl in premises where prostitution is carried on. Section 7 prohibits prostitution in or in the vicinity of public places and makes the same punishable. Section 8 provides : " Whoever, in any public place, or within the sight of, and in such manner as to be seen or heard from, any public place, whether from within any building or house or not (*a*) by words, gestures, wilful exposure of her person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise attempts or endeavours to tempt or attracts or endeavours to attract the attention of, any person for the purpose of prostitution ; or (*b*) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency, for the purpose of prostitution " shall be liable to punishment.

Any person who having the custody, charge or care of any woman or girl or aids or abets the seduction for prostitution of that woman or girl shall be liable to punishment. According to section 13, a Special Police Officer shall deal with offences under the Act.

Section 18 provides that a Magistrate may, on receipt of information of the police or otherwise, that any house, room, place or any portion thereof within a distance of two hundred yards of any public place referred to in sub-section (1) of section 7, is being run or used as a brothel by any person, or being used by prostitutes for carrying on their trade, issue notice on the owner, lessor or landlord of

such house, room, place or portion or the agent of the owner, lessor, or landlord or on tenant, lessee, occupier of, or any other person in charge of such house, room, place or portion to show cause within 7 days of the receipt of the notice why the same should not be attached for improper use thereof, and if, after hearing the person concerned, the Magistrate is satisfied that the house, room, place, or portion is being used as a brothel or for carrying on prostitution then the Magistrate may pass orders :—

(*a*) directing eviction of the occupier within 7 days of the passing of the order from the house, room, place or portion ;

(*b*) directing that before letting out during the period of one year immediately after the passing of the order, the owner, lessor, or landlord shall obtain the previous approval of the Magistrate.

Section 20 authorises the removal by a Magistrate of any woman or girl who is carrying on the trade of a prostitute if it appears to him that such woman or girl is a prostitute and that it is necessary in the interest of the general public that such woman or girl be removed from the local limits of his jurisdiction and be prohibited from re-entering the same.

The above are some of the important provisions of the Act. The provisions of the Act are open to criticism in several respects :

(1) The Act seems to be *ultra vires* of the Constitution as it illegally prohibits the carrying on of a trade by a woman[1].

(2) The Act imposes unreasonable and illegal restrictions, the result of which may be that the woman would be left to starve if she has no other source of livelihood. The chances of her being rehabilitated in society are nil. In *Chintaman Rao* v. *State of Madhya Pradesh*[2], it was said that where the effect of any restrictive legislation which totally prevented a citizen from carrying on a trade, business or a profession, such a restriction is unreasonable and void.

In *Shama Bai* v. *State of Uttar Pradesh*[1], where the petitioner, a prostitute and singer, residing in Allahabad, complained that the Act was *ultra vires* and imposed unreasonable and illegal restrictions, his Lordship Sahai, J., observed : " that under the provisions of the Penal Code prostitution is not an offence. Section 372 of the Penal Code only prohibits the sale, letting to hire, or otherwise disposing of any person under the age of 18 years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose.

After having read the Act carefully I am of the opinion that it is not quite correct to say that the Act prohibits the carrying on of the profession or trade of a prostitute though it cannot also be denied that it has imposed restrictions on the same."

A brothel has been defined in the Act by section 2 (*a*) as follows :—

" In this Act, unless the context otherwise requires, ' brothel ' includes any house, room, or place or any portion of any house, room, or place, which is used for pur-

1. *Shama Bai* v. *State of Uttar Pradesh*, A.I.R. 1959 All. 59.
2. (1950) S.C.J. 571 : A.I.R. 1951 S.C. 118.

poses of prostitution for the gain of another person or for the mutual gain of two or more prostitutes." According to the definition what has been prohibited is not the profession or trade of a prostitute, but the carrying on of that profession for the gain of another person or for mutual gain of two or more prostitutes. (*Shama Bai* v. *State of Uttar Pradesh*)[1]. This Act never intended that the women or girls used for such traffic shall be liable to punishment.

Section 4 (2) says : " where any person is proved (*a*) to be living with, or to be habitually in the company of a prostitute (*b*)....... (*c*) to be acting as a tout or pimp on behalf of a prostitute it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution."

His Lordship Sahai, J., held " In the absence of there being any evidence that they are living on the income of the prostitutes with whom they are living or are encouraging, aiding, abetting or helping them towards prostitution, it would be extremely risky and not free from danger to draw any presumption as contemplated by the above section. This sub-section imposes a restriction which appears to have no reasonable relation to the object in view, *i.e.*, the suppression of immoral traffic in woman or at any rate no proximity or close relation, and for that reason the restriction appears to be unreasonable."

In *Soni Bachu Lakhman* v. *The State of Gujarat*[2], Raju, J., observed: "If the husband lives with his wife, and allows his wife to be a prostitute, the husband is doing so, for the purposes of living on the earnings of prostitution of his wife. If the husband allows his own wife to be a prostitute, the presumption would be stronger that he was doing so for the purpose of living on her earnings of prostitution. Therefore the presumption mentioned in section 4 (2) of the Act can be applied to the case of a husband living with his prostitute wife. When such a presumption is drawn, that would be sufficient to constitute the house of the applicant a brothel.

In *Shama Bai's case*[1], Sahai, J., casually expressed his opinion on section 20 thus: " Very wide powers are given by section 20 to a Magistrate to remove any woman or girl who is a prostitute from any place within his limits of jurisdiction if he considers that it is necessary to do so in the interest of the general public and also to prohibit them from re-entering it again. The section contains nothing to guide the Magistrate in deciding which prostitute to remove outside his jurisdiction and which not to remove." There is no period fixed in section 20 for which a person can be removed from a place and prohibited from re-entering it. As the section runs, a person can be removed for all time and can be prohibited from re-entering for all times which would be inconsistent with clauses (*d*) and (*e*) of Article 19 (1) of the Constitution providing that "All citizens shall have the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India."

The arrest will be made only by a Special Police Officer appointed under the provisions of the Act. In In re *Kuppammal*[3], investigation was conducted by an Inspector of Police. Justice Somasundaram held : " Section 13 no doubt enables a Special Police Officer to associate non-official body for the purpose of dealing with

1. A.I.R. 1959 All. 59 (62).
2. A.I.R. 1960 Gujarat 37.
3. (1958) 2 M.L.J. 606 : A.I.R. 1958 Mad. 389.

offences under this Act. But when the section says that a particular Police Officer alone shall deal with offences under this Act it seems to me that such a particular officer alone shall investigate the offence."

The Act could only deal with women or girls who are under the age of 21 years (section 16, clause (1) " Where a Magistrate has reason to believe from information received from the police or otherwise, that a girl apparently under the age of 21 years, is living or is carrying on, or is being made to carry on prostitution, in a brothel, he may direct the Special Officer to enter such brothel and to remove therefrom such girl and produce her before him."

It is not practicable to carry out the provisions of the Act effectively.

It is settled law that the restrictions imposed by an Act are subject to judicial scrutiny and it will be open to Courts to say whether a particular restriction is reasonable or not.

Prostitution has existed in almost all civilized countries from earliest time. " It cannot also be denied that there are several external causes which induce women to turn to prostitution for livelihood over which they have no control. The most important ones are :—

(1) difficulty of finding employment ;

(2) excessively laborious and ill-paid work ;

(3) hard treatment of girls at home ;

(4) promiscuous and indecent mode of living among the overcrowded poor ;

(5) the aggregation of people together in large communities and factories, whereby the young are brought into constant contact with demoralised companions ;

(6) the example of luxury, self-indulgence and loose manner set by the wealthier classes ;

(7) demoralising literature and amusements ;

(8) the arts of profligate men and their agents." [1]

It is also certain that prostitution is a slur on human dignity and a matter of shame to human civilisation. The aim of all civilised nations is to eradicate it gradually.

In view of the above principles one can say that Parliament should place only reasonable restrictions in the first instance and then by a process of education and rousing enlightened public conscience to the various evil consequences of prostitution and its humiliating and degrading character bring about its ultimate elimination.

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1. *Shama Bai* v. *State of Uttar Pradesh*, A.I.R. 1959 All. 59 (62).

LAW OF COURT-FEES.

By

B. V. VISWANATHA IYER, *Advocate*, *Madras*.

The subject of Court-fees levied in Courts has constantly engaged the attention of the Judges and lawyers in this country. It is quite common at a gathering of lawyers to have a resolution as to the urgent need for reduction of Court-fees passed *nem com* and even a discussion of the subject is often ruled out as superfluous. Such a discussion has really become unnecessary after the publication of the conclusions of the Law Commission of India on the subject in 1958. It is needless to canvass whether the levy is a fee or a tax, for obviously the march of legislation in the several Provinces and States after the Devolution Act of 1920 will show that it is the latter. The agitation for reduction of Court-fees has sometimes been said to be purely lawyer-sponsored. The lawyer has no reason to be apologetic on this score. It is a fact that lawyers are able to earn a better fee wherever the Court-fee levied is lighter. It was so on the Original Side of the High Court before the present scale of fees was brought into force. It is so even now in such matters as Writ Petitions. If the Court-fee levied is fair and reasonable it certainly enables the lawyers to earn their full fees, which they deserve for their work. The lawyer alone can express the difficulties of the litigant on this subject as he is confronted every day with clients whose resources are hardly sufficient to pay the full *ad valorem* fees and also the prescribed lawyers' fees. There is no such class as litigants in general to voice their grievances on the subject. Indeed every citizen is a present or potential litigant and it is for the lawyers through whom they act to explain the harshness of the levy of Court-fees.

The levy of a high rate of Court-fees has sometimes been sought to be justified for the reason that it has the benevolent object of repressing vexatious litigation. Even in 1835 Lord Macaulay animadverted on this theory in the following terms :

" This is directly in the teeth of all reason. Why did dishonest plaintiffs apply to the Court before the institution fee was imposed ? Evidently because they thought they had a chance of success. Does the institution fee diminish the chance? Not in the smallest degree. It neither makes pleading clearer nor the law plainer nor the corrupt Judge purer nor the stupid Judge wiser. It will no doubt drive away dishonest plaintiffs who cannot pay the fee. But it will also drive away honest plaintiffs who are in the same situation. There is not the smallest reason to think that it will exclude a greater proportion of the one sort than the other. It divides all plaintiffs into two classes. But the principle of the division is not that honest men are admitted and dishonest men excluded but that the richer are admitted and the poorer excluded."[1]

There is no doubt a certain amount of dishonest litigation in this country but equally undoubtedly there is a very large mass of litigation where litigants are in doubt. With complex systems of laws and a rousing sense of citizenship rights which are the accompaniments of advancing civilisation there will be a large margin of

1. *See* Lord Macaulay's Minute, dated 25th June, 1835.

doubt in their interpretation giving rise to honest litigation and the society will be hindered in its progress by the levy of heavy Court-fees which will be repressive of honest litigation. The only known method by which a dishonest litigant can be punished is by mulcting him in costs and not be erecting high tariff walls round Court houses, which will apply to honest litigants as well.

Quite clearly the heavy scale of Court-fees is looked upon as an increasing and easily collectable source of revenue to the State. Should it be so? The Law Commission definitely answered the question in the negative in the following terms :

" India is, so far as we know, the only country under a modern system of Government which deters a person who has been deprived of his property or whose legal rights have been infringed from seeking redress by imposing a tax on the remedy he seeks. Our States provide hospitals which give free treatment to persons who are physically afflicted. But if a person is injured in the matter of his fundamental or other legal rights, we bar his approach to the Court except on payment of a heavy fee. The fee which we charge is so excessive that the civil litigant seeking to enforce his legal right pays not only the entire cost of the administration of civil justice but also the cost incurred by the State in prosecution of and punishing criminals for crimes with which the civil litigant has no concern "[2].

The Law Commission deserves great praise for the assiduous care with which the data was worked out and the income from civil justice was apportioned as between the civil and criminal sides of the administration of justice. The net result was shown to be a fairly large surplus of revenue over the expenditure. While reviewing the legislative amendments in the States the Commission observed that " the State seems to have dealt with the litigants in the matter of Court-fees in no better manner than does the rapacious landlord with his tenant or the profiteering trader with the consumer."[3] It is unnecessary to dilate on the viciousness of rule that the litigants as a class should be taxed for the benefit of the general revenues. On the other hand, the correct rule will be to make payment of the salaries and pensions of Judges from the public funds and that only the other expenses of the administration of justice should be borne by the litigants. This will be in consonance with the practice prevalent in the United Kingdom and the United States. With the above object the Law Commission formulated the following recommendations :

" (1) It is one of the primary duties of the State to provide the machinery for the administration of justice and on principle it is not proper for the State to charge fees from suitors in Courts.

(2) Even if Court-fees are charged the revenue derived from them should not exceed the cost of the administration of civil justice.

(3) The making of a profit by the State from the administration of justice is not justified.

(4) Steps should be taken to reduce the Court-fees so that the revenue from that is sufficient to cover the cost of the civil judicial establishment. The salaries of judicial officers should be a charge on the general tax-payer.

(5) There should be a broad measure of equality in the scale of Court-fees all over the country. There should be a fixed maximum to the fee chargeable.

2. Report of the Law Commission of India, 1958, Vol. I, page 487.

3. Ibid., page 505.

(6) The rates of Court-fees on petitions under Articles 32 and 226 of the Constitution should be very low if not nominal.

(7) The fees which are now levied at various stages such as stamp to be affixed on certified copies and exhibits and the like should be abolished.

(8) When a case is disposed of *ex parte* or is compromised before the actual hearing, half the Court-fee should be refunded to the plaintiff.

(9) The Court-fee payable in an appeal should be half the amount levied in the trial Court."[4]

The above recommendations are substantially in accord with the suggestions put forward from time to time by eminent Judges and lawyers as also of several Bar Associations and have naturally kindled hopes of a modification of the law.

Unfortunately, however, the Commission while diagnosing the disease and suggesting the possible remedies has not prescribed the *modus operandi* for the suggestions to be implemented. Thus it is laudable that there should be a lower scale of fees and that there should be a broad measure of equality in the scale of fees all over the country. How is this to be achieved? It may be remembered that under the Constitution of India, "the fees taken in all Courts except the Supreme Court" falls in the State List[5]. In Madras and Andhra Pradesh there are self-contained enactments on the subject and they no longer owe allegiance to the parent Act. It is also well known that most of the States have limited financial reasources and can scarcely afford to give up a portion of this head of revenue. To ask the States to reduce the Court-fees is like asking a hungry man to surrender a portion of his meagre rations. The question will be, how the States can be persuaded to implement the recommendations of the Law Commission. A radical solution will be to remedy the wrong done under the Devolution Act and insert the item of Court-fees in the Union List. This will involve an amendment of the Constitution, may take time and is not sure of acceptance. The only other method of solving the problem will be for the Union Government to take up the subject at inter-State level and bring into force an integrated and lower scale of Court-fees. In fact there is a uniform scale of Court-fees and stamp duty prescribed under the Indian Income-tax Act and the Companies Act, and in respect of the latter even States which had prescribed a higher fee have fallen in line with the uniform and lower fee. To achieve the same purpose it may be necessary for the Union Government to coax the State Governments to reduce the Court-fee and at the same time offer suitable financial subventions or allot alternate sources of revenue to them in order to make good the estimated loss of revenue. It would have been better if the Law Commission had given a lead as to the method to be adopted for implementing their preposals. Indeed the Commission has in dealing with other subjects made such suggestions including amendments to the Constitution wherever necessary. It is hoped that the conclusions arrived at by the Law Commission after so much trouble will not be a mere pious wish but will be implemented by the Union Government in consultation with the States by adopting a policy of give and take and thereby remedy a standing wrong to the litigant public of this country.

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4. Report of the Law Commission of India, 1958, Vol. I, pages 509, 510.

5. Constitution of India, Schedule VII, Item 2.

SECTION 426 (2-A), CRIMINAL PROCEDURE CODE—A NOTE.

By

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According to section 426 (2-A), Criminal Procedure Code, when any person other than a person convicted of a non-bailable offence, is sentenced to imprisonment, by a Court and an appeal lies from that sentence, the Court, may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail. for a period sufficient in the opinion of the Court to enable him to present an appeal and obtain the orders of the appellate Court under sub-section (1), and the sentence of imprisonment shall as long as he is so released on bail, be deemed to be suspended.

There are some Magistrates, it would appear, who as a rule refuse to suspend the sentence passed by them and leave the party to move the appellate Court straight and obtain bail. This is really very bad and not at all proper. Further, some Courts it would appear do not countenance any such petition for suspension of sentence if it is not filed soon after the sentence is pronounced. This beneficial measure should not be left to the whims and fancies of the Magistrate, but should be strictly complied with. Trial Courts should as a rule, grant bail and suspend the sentence passed by them if the accused intends to appeal and or is represented by an advocate or pleader.

But now, the real difficulty arises this way. Section 426 (2-A) does not go far. It should embrace all Courts, not only the trial Courts, but also the appellate Courts for all bailable offences and the words "or Revision" should be added after the word "appeal" in all the contexts appropriate to that section. Since there are several instances in which the High Court in Revision sets aside the Judgments of subordinate Courts and the accused has to inevitably suffer a lot in the mean-while, without any justification whatever, the amendment suggested is highly desirable and in the ends of justice. The section may also be extended to non-bailable cases as well with suitable safeguards, both in the trial Courts and in the appellate Courts depending upon the facts and circumstances of each case.

MORAL BASIS OF CONTRACT.*

By
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The caption under which I have chosen to discuss my thesis to-day is the *Moral Basis of Contract.*

I need hardly explain the reason for my choosing this topic, for we, as men engaged in the profession of settling disputes which arise in society, ought to take stock, now and then and particularly on occasions such as the present one of our progress in the continuous effort of equating law to justice, in order the better to deal with the new problems that confront us in an ever-changing and dynamic society. As that great American Judge, Mr. Justice Holmes observed "the law is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end and it always retains old ones from history at the other. .... It will become entirely consistent only when it ceases to grow."

The Law of Contract partakes of this general tendency—namely to found its tenets on justice and morality. Here we are all so familiar with the limits of the enforceability of contractual obligations and the sanctions of law for their breaches that we are inclined to lose sight of the fact that the governing principles have been wrought in England from masses of separate rules applied by the Courts from time to time in the decision of issues between individual litigants and in India, adopted in a codified, if incomplete, form. But even as these principles can together form an intelligible system erected by decision after decision, so also the changing need of society may so undermine it that the whole system may become obsolete or threatened with destruction.

Perhaps the most important of such developments at the present day is the reason or otherwise for holding men to their contractual ties or the untying of them in the interests of justice and fairplay. Lawyers of the last century were imbued with the creed of the " philosophical Radicals " who drove the chariot of reform. Their patron saint was Ricardo. Individualism was both fashionable and successful. The state, as it were, delegated to its members the power to legislate. The freedom and sanctity of contract were the necessary instruments of *laissez faire.*

But now the background of the law, political and economic, has vastly changed. Our notions of the state and its role are summed up in the concept of a Welfare State. And in our country particularly, we have sealed our faith in planned progress. " In a planned economy freedom and enterprise appear not perhaps as sinister qualities but as superannuated survivors from an obsolete environment."[1] The state may in the interests of social welfare compel persons to make contracts as when a motorist must insure against third party risks; it may as by the Rent Control Acts or the Tenants' Protection and Fair Rent Acts either prevent a party

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1. Cheshire and Fifoot: Law of Contract.

to a contract from enforcing his rights under it or revise its terms according to what the State thinks just and proper.

Yet another trend to which I would like to draw your attention is the curtailment of freedom of contract at the present day, by judicial precedent. Here, the most popular technique among Judges for imposing in public interest restrictions on the enforceability of contracts is the doctrine of implied term. The harsh rule that a party to a contract must do or die, laid down in the early case of *Paradine* v. *Jane*[2] is no longer the guide but on the contrary the Courts are now inclined to imply terms in a contract to relieve the parties to it from unexpected and onerous obligations. As Lord Justice Denning observed in his famous judgment in the British *Movietonews case*[3] 'the day is gone when we can excuse an unforeseen injustice by saying to the sufferer: "It is your folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself. We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chamiers".

This implied term doctrine has proved a most useful instrument in the hands of the Judges in developing measures of relief in cases of supervening impossibility of performance or the frustration of contracts. But the *raison de'etre* of this doctrine has recently been the subject of acute controversy among jurists and text writers. There are at least two theories for this. One is that the Court in taking up the contract and excusing parties to it in case of non-performance is that the Court in interpreting the contract can infer or imply a term to the effect that the parties to it had they foreseen the contingency which had made the contract unexpectedly onerous, if not impossible, would have said that the contract would not be enforceable in such a contingency.

The alternative theory is that the Court in thus relieving the parties to a contract from their duty to perform it, imposes upon them a solution that is just and reasonable in view of the unexpected circumstances that have in fact occurred. The question as to which of these two theories is correct is by no means merely academic for if the Court were merely to infer or imply a term in the contract itself, no term could be implied in it which is inconsistent with the express, though ex-hypothesi inadequate, terms of it; or if the Court may do what it considers just and convenient, it can altogether ignore, in the words of Lord Sumner " the individuals concerned, their temperaments and failings, their interest and circumstances." In fact, as Lord Wright has said in his Legal Essays Addresses " the truth is that the Court decides the question in accordance with what seems to be just and reasonable in its eyes. The Judge finds in himself the criterion of what is reasonable. The Court is in this sense making a contract for the parties though it is almost blasphemy to say so."

But the consensus of expert opinion has been that though historically the implied term doctrine has played its part, perhaps an indispensable part, yet it should no longer be regarded as an adequate explanation. And whatever be the real explanation, it is undeniable that Courts have in recent years been willing to receive support from the theory of unjust enrichment or theory of just solution in case of supervening impossibility. In our country the Supreme Court in

2. 1647 Aleyn 26.
3. L.R. (1951) 1 K.B. 190.

Satyabrata Ghose's case[4] has given a quietus to this controversy by holding that section 56 of the Contract Act enacts a rule of positive law and does not depend on any implied term doctrine.

A third instance of what I consider to be a break from the past is the doctrine of fundamental obligation or the doctrine of fundamental term. According to this doctrine no exempting clause stipulated for by a party and however wide, may protect the party who has broken the basic duties created by the very nature and character of the contract. The party by his conduct has destroyed the whole of the contract and can no longer rely on any one of its component parts. For example in *Alexander* v. *Railway Executive*[5] the Railway Authority sought to relieve itself from liability to the consignee of goods under the exemption clause in the contract of carriage of goods which was to the effect that the Railway authority would not be responsible for 'misdelivery' of goods. But this clause was held not to cover the facts of the case. The Railway authority having allowed a deliberate delivery to a person had been guilty of a "fundamental breach of the contract".

Moreover the process of mass production and distribution has introduced the mass contract—uniform documents which must be accepted by all who would deal with large-scale organisations. If a person wishes or is driven to buy from, sell to or work for a Government or other public body, if he would send goods by train or would obtain electricity, he must comply with standard terms which need not be understood since they may not be questioned. The French Lawyers call such transactions contracts of adhesion which contain many conditions, are presented for acceptance en bloc and are not open to discussion. The only choice left to the individual is to accept or decline the transaction *in toto.*

It may well be doubted if in these documents much of contract survives but the name. They are more like bye-laws than a contract.

Why I have been dilating a little upon this aspect of the matter is that contemporary trends in this branch of the law lead us to the conclusion that the juristic blessedness or halo which attached to contracts in the last century and which were often regarded as so sacred that breaches of them were considered as a mark of unethical or sinful aberrations, exists now only in name. The moral basis of contract has changed—whether for better or for worse, we cannot say. It was originally believed to be the sanctity of contractual obligations springing from that mystical term "*consensus ad item* or the identity of consenting minds". Now social welfare and status rather than contract is the measure of enforceability or otherwise of duties and obligations under a contract. The same tendency is found in the interpretation of the obligation of contracts clause in the American Constitution which says that "no state shall pass any law impairing the obligations of contracts". The U. S. Supreme Court has observed in *Atlantic Coast Line Company* v. *Goldsboro*[6], that it is settled that neither the contract clause nor the due process clause has the effect of over-riding the power of the State to establish all regulations that are reasonably necessary to serve the health, safety, good order, comfort, or general welfare of the community.

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4. (1954) 1 M.L.J. 41: (1954) S.C.J. 1.
5. L.R. (1951) 2 K.B. 882.
6. 252 U.S. at p. 558.

So the fate of Contract is in the cauldron and what will come of it, nobody can yet say. But I may hazard one suggestion ; the time is fast approaching when the whole structure of contract law with its preconceived ideas and nineteenth century doctrines would appear to have become so rigid and static and that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures. If I have drawn your attention to this development I have achieved my purpose in reading this paper.

Thank you.